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ABSTRACT

This paper reviews First Amendment federal court cases pertaining to religion in schools, suggesting that the findings reveal a judiciary uncertain of where to strike a balance between the interests of the majority and the rights of the minority. The first area discussed is public aid to private schools. The cases covered in this discussion illustrate why courts have had difficulty defining with precision the wall separating church from state in private school aid: children benefit from such aid, but so do religious organizations. The next area covered is prayer and Bible reading in public schools, an extraordinarily sensitive component of constitutional law on account of the religious diversity and the sense of duty to individual principle inherent in our populace. The third area of litigation discussed is student religious meetings in public school facilities, because this issue is affected by the Equal Access Act (1984). This is followed by a discussion of the regulation of parochial schools, an area characterized by conflict between the compelling state interest in high-quality education for all children and the constitutional rights of those children who attend parochial schools and their parents. The conclusion suggests that jurists are unlikely to develop unambiguous criteria for delineating the proper distance between church and state. Notes are included. (TE)

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# RECENT LITIGATION CONCERNING SEPARATION OF CHURCH AND STATE

A Paper Presented

to the

30th ANNUAL CONVENTION

THE NATIONAL ORGANIZATION
on
LEGAL PROBLEMS OF EDUCATION

by

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The passions aroused by religious conviction are unequaled. Cognizant of centuries of strife between governments and their peoples over religion, the constitutional framers sought to divide church from state. In writing the first amendment, however, they created a new dilemma: how may government avoid promoting religion while allowing individuals to practice freely their religion?

A religious awakening in America has spawned a renewed interest in determining the proper height of the wall separating church from state. The public schools continue to be a principal battleground. From creation science to secular humanism, from the state's padlocking of a church to keep it from operating a school to a parent's suing because a reading series includes passages on tolerance, first amendment religion cases crowd our court dockets. The rulings reveal a judiciary uncertain where to strike a balance between the interests of the majority and the rights of the minority.

## Public Aid to Private Schools

For many years and for many reasons, various states have tried to discover means to aid the education of students attending nonpublic schools. Often, the programs have done much good, but, because most private schools have religious affiliations, any expenditure of state funds to nonpublic schools carries the risk of breaching the wall separating church and state. Few dilemmas in school litigation have the rich and varied history of state aid to private schools; the U.S. Supreme Court over the course of the last fifty years has heard no fewer than nineteen cases

involving legislation of at least nine states and the federal government on issues as varied as the loan of textbooks to supplementing private school teachers' salaries.1 Yet the cumulative criteria for striking a neutral balance remains unclear; two more cases are currently on the docket before the Court.2

The story of the past litigation is well-told; suffice it to say here that each new effort to aid nonpublic schools brings its own thorny problems which defy simple classification. Mr. Justice Black's struggle with the issue is illustrative: in 1947, he wrote for the 5-4 majority upholding New Jersey's bus fare reimbursement program;3 twenty-one years later he called a New York law providing the loan of textbooks to private schools "a flat, flagrant, open violation of the First and Fourteenth Amendments."4 Although often sharply-divided, the Court, in general terms, has upheld state aid to provide textbooks,5 bus service,6 certain auxillary services,7 financial grants to higher education,8 and state income tax deductions for private school tuition;9 the Court has struck laws which provide private schools with salary supplements for teachers,10 certain forms of testing,11 maintenance and repair for buildings,12 direct tuition reimbursements and tax credits,13 instructional equipment and materials,14 and field trip transportation.15 In related matters, the Court has allowed property tax exemptions for nonprofit religious enterprises16 and has ruled that federal tax payers have standing in court to challenge Title I of the Elementary and Secondary Act of 1965.17

Any synthesis of the reasoning for the above decisions is fraught with danger and qualifications, but the oft-quoted words of Chief Justice Burger elucidate the clearest test available: "First, the statute must have a secular legislative purpose; second, the principal or primary effect must

be one that neither advances nor inhibits religion . . .; finally, the statute must not foster can excessive government entanglement with religion.'"18 The gravamina in the cases currently before the U.S. Supreme Court turn on this three-pronged test.

In Felton v. Secretary, United States Department of Education,19 federal taxpayers seek to halt the sending of public school teachers into parochial schools to provide remedial education required by federal law.20 Since 1966, New York City officials have found the most efficient means of providing Title I services for private school students is to send public school teachers directly to the private school campus. No claim was made that any of the public school teachers so engaged attempted to use their positions to proselyte their faith; the Appellate Court wrote:

> We have no doubt that the program here under scrutiny has done much good and that, apart from the Establishment Clause, the City could reasonably have regarded it as the most effective way to carry out the purposes of the (ESEA) Act. We likewise have no doubt that the City has made sincere and largely successful efforts to prevent the public school teachers and other professionals whom it sends into religious schools from giving sectarian instruction or otherwise fostering religion.21

However, the Court believed that the first amendment ban on state establishment of religion prohibits the use of federal funds to provide public school teachers in private schools. Such use, the Court believed, inexorably involves entanglement between church and state.

Noting that its role "in a field that has been so thoroughly ploughed by the Supreme Court . . . is not to make an independent interpretation of the constitutional text or to engage in creative distinctions but to do its best to follow what the Court has said,"22 the Second Circuit laboriously reviewed salient precedent, giving particular attention to Meek v. Pittenger. It read Meek as being decided largely on the ground of unacceptable entanglement, not aid to religion.23 In the end, the Court found that "unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment."24 To ensure that the public school teachers working on the private school campuses did not exceed the bounds of the first amendment would involve excessive and enduring entanglement.25

The entire tone of the dicta is sympathetic to New York's program: "This is a hard case, and hard cases . . . can make bad law. We fully understand and appreciate why . . . the district judge here struggled to find constitutional justification for a program that apparently has done so much good and little, if any, detectable harm."26 But recalling its obligation to follow settled law, the Court concluded, "We cannot escape the conviction that, despite the attempted distinctions, appellees are really asking us to say that Meek was wrongly decided. . . Whatever the merits of that argument may or may not be, we are nevertheless bound by the Meek decision."27 The Supreme Court, of course, is not so bound and has consented to hear the argument.

Muddying the water of the Felton appeal is the Michigan case, School District of City of Grand Rapids v. Ball, which has been combined, upon the urging of the Justice Department, with Felton.28 At issue in Ball are

local programs, financed with local and state taxes, which provide public school instruction on private school campuses. The courses are taught by instructors under the hire of the public school in classrooms leased from the private schools. Many of the teachers of the courses are or were regular, full-time employees of the private school from which space is leased. The programs have operated since 1976 and grew four-fold in three years. The specific courses available in the elementary schools would not otherwise be available in the nonpublic schools; in the secondary schools, one physical education course required for graduation is offered only through the challenged program.

The Sixth Circuit Court of Appeals ruled that the programs bestowed significant financial benefits upon a narrow class of religious schools.29 Indeed, the Court believed that "the Public School District is gradually, but surely, taking over an integral function of these religious schools; namely, providing an education to parochial students."30 In addition to having a primary effect of advancing religion, the programs proposed insoluable entanglement issues. First, the programs caused the school board, in an effort to pass a local millage act, to foster political division along religious lines by touting the benefits of the challenged programs to private school parents.31 Second, the Court believed that the potential for the individual teachers to advance religious doctrine under the programs' conditions could not be ignored.32

Far from feeling the tugging emotions experienced by the Felton Court, Chief Judge Edwards wrote for the majority:

> We recognize, of course, the increasing impact of Supreme Court majority approval of public funding for religiously neutral supplies and services which are

> provided to all schools, including parochial schools. If, however, what has been adopted by the Grand Rapids School Board were added to the list of such approvals, the separation of church and state will be effectively ended in the field of public education.33

Circuit Judge Krupansky dissented. He believed that a logical extension of Allen, Meek, and Wolman is that "oral secular instruction so long as such instruction is, in fact and practice, confined to secular ideologies and does not have the primary effect of advancing religion"34 is acceptable. Judge Krupansky complained that no record, or even allegation, existed that the teachers proselyted their faith while on the public payroll; rather, he claimed, the majority relied solely upon the possibility that such advancement of religion could occur.35

On December 5, 1984, the U.S. Supreme Court heard oral arguments on the cases. The recent ruling in Mueller v. Allen36 gives indication that the Court, despite Judge Edwards fears, will take a more accomodating view of state aid to private schools. Felton and Ball will show whether Mueller was the beginning of a new trend of high court benevolence toward state aid to parochial schools. Of particular interest will be the alignment of the majority given the age of five of the justices and the Reagan Administration's support for increased aid to private schools.

In a slightly different twist to state aid to private schools, the plaintiffs in McCarthy v. Hornbeck claimed that if Maryland did not provide free transportation for private school children, it would violate the free exercise clause.37 The U.S. District Court countered that "a statute does not impinge on a constitutional right merely because it does not

subsidize"38 the free exercise of religion. The Court did not require Maryland to transport private school children at public expense.

The recent cases illustrate why the courts have had such great difficulty defining with precision the wall separating church from state in private school aid. Whenever children benefit from the aid, the program advances the state interest in educating children. But any financial grant to parochial schools or the parents who send their children to such schools cannot help but benefit the religion as well. Given the sharply divergent views as to where to strike the balance between the child's benefit and the religious benefit, and the varying degrees of entanglement caused by any aid, the recent cases are helpful as guideposts to current trends but certainly not a lasting settlement to aid for nonpublic schools.

Prayer and Bible Reading in the Public Schools

The proper role of prayer in public life, especially in public school classrooms, has become a perennial issue.39 Supreme Court precedent leaves little doubt that the state and their creations are prohibited from authorizing, composing, or encouraging prayer in public schools,40 but a number of efforts are afoot to bypass the Court's constitutional interpretation. President Reagan has established as one of his major goals the the passage of a constitutional amendment allowing voluntary prayer in public schools,41 and several bills have been introduced in Congress which would prohibit the federal judiciary from hearing challenges to voluntary school prayer and Bible reading.42

In 1985, the Supreme Court will have the opportunity to review its stance on public school prayer in Wallace v. Jaffree.43 Three issues are at stake: 1) may teachers, absent motivating state statute or board

policy, lead voluntary prayer in the classroom; 2) may the state authorize a prayer to be recited by willing students; and 3) are moments of silent meditation constitutionally permissable?

Certain Mobile County, Alabama, school teachers had led their students in the recitation of the Lord's Prayer and three common blessings.44 The state claimed that such prayers were "without state action or participation and not pursuant to any policy or statute authorizing or encouraging such activities."45 In addition, they claimed that the "Suypreme Court has misread history regarding the first amendment and has erred by holding that the first amendment is made applicable to the states through the fourteenth amendment."46 The United States District Court for the Southern District of Alabama agreed that the Supreme Court misinterpreted the Constitution and dismissed the complaint against the teachers' actions.47 The Court did note that such a conclusion may "be no more than a voice crying in the wilderness and this attempt to right that which this Court is persuaded is a misreading of history (perhaps) will come to nothing more than blowing in the hurricane."48 Because the District Court believed that the first amendment does not prohibit the state establishment of religion, it did not rule on the remaining two issues.49

The Eleventh Circuit took a different view. Although quick to point out that its role was not to decide whether or not prayer in public schools is a desirable policy, the Circuit Court did not believe that lower federal courts could ignore stares decisis in a matter so thoroughly analyzed by the Supreme Court.50 The Circuit Court found teachers to be agents of the state and "If a statute authorizing the teachers' activities would be unconstitutional, then the activities, in the absence of a statute, are also unconstitutional."51

The Court found the state-composed prayer to be a quintessential religious practice which could satisfy no secular purpose.52 "The primary effect of prayer is the advancement of ones (sic) religious beliefs,"53 and, as a result, composing a prayer acknowledging the existance of a supreme being involves the state in advancing religion. "The fact that the prayer is voluntary and non-demoninational does not neutralize the state's involvement. The state must remain neutral not only between competing religious sects, but also between believers and non-believers."54

With regard to meditation, both the District Court55 and the Circuit Court56 found the intent of the statute to return prayer to the public schools and the statute's primary effect to advance religion. The Circuit Court wrote:

> We do not imply that simple meditation or silence is barred from public schools; we hold that the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation. It is not the activity itself that concerns us; it is the purpose of the activity that we shall scrutizize.57

In the appeal to the U.S. Supreme Court, the Reagan Administration has filed in behalf of Alabama. In its amicus brief, the Justic Department calls silent meditation "a legitimate way for government to provide an opportunity for both religious and nonreligious introspection in a setting where, experience has shown, many desire it. It is an instrument of toleration and pluralism, not of coercion or indoctrination."58 Oral arguments were heard December 4, 1984.

Given the history of Supreme Court decisions striking prayer from the classroom and the uniformity of lower federal courts in striking silent meditation laws,59 any form of reversal in Jaffree by the Supreme Court would mark the dawn of a dramatically different day in church-state relationships. Silent meditiation, though, is before the Court for the first time. A rider providing for silent meditation in the schools passed the House in the summer of 1984 before being dying in conference.60 Similar and stronger measures are sure to resurface if the Court upholds Jaffree, and the Supreme Court may find silent meditation an innocuous compromise. If such is the case, the words of Chief Justice Burger bear special significance:

> We (cannot) fail to see that in constitutional adjudication some steps, which when taken were thought to approach "the verge" (of constitutional violation), have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop . . . As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.61

Three additional recent prayer and Bible cases merit note. In May v. Cooperman,62 a New Jersey statute which permitted students "to observe a 1 minute period of silence to be used solely at the discretion of the individual student,"63 was struck. The District Court for New Jersey held

that the law had no bona fide secular purpose, advanced the religion of some and inhibited the religion of others, and entangled the government in divisiveness among and between religious groups. Despite this ruling, the Board of Education of the City of Woodbury continued its twenty-two year policy of starting each school day with a moment of silence. The New Jersey Appellate Court judge, noting that May v. Cooperman was on appeal to the Third Circuit and the pending case of Wallace v. Jaffree before the U.S. Supreme Court, refused to issue an injuction to stop the practice.64

Another long standing tradition was at issue in Crockett v. Sorenson.65 For over forty years, the Bristol, Va., public school system had provided instruction to fourth and fifth graders in Bible. The classes were voluntary and carried no academic credit. The teachers of the classes were neither hired nor supervised by the public schools, but were provided by a private sponsoring group. The court held that "The first Amendment was never intended to insulate our public institutions from any mention of God, the Bible or religion. When such insulation occurs, another religion, such as secular humanism, is effectively established."66 The court concluded that the objective teaching of the Bible passes constitutional muster, but the Bristol program failed primarily in that it was sponsored and taught by an agency not controlled by the state.67

The proper role of prayer and Bible reading in public schools continues to be an extraordinarily sensitive component of constitutional law. As Justice Brennan has observed, "the line which separates the secular from the sectarian in American life is elusive. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty."68 The religious diversity and the remarkable sense of duty to individual principle embodied by our nation's people will keep our

courts in continual search, as was Diogenes, for the truth separating governmental encouragement, neutrality, and hostility vis-a-vis religion.

Student Religious Meetings in Public School Facilities

On frequent occasion, school students wish to meet on school property to discuss or practice their religious faiths under the protection of the free exercise clause of the first amendment. School officials, however, note that such use of schools may violate the establishment clause of the first amendment. Over the past three years, a number of court cases and one piece of federal legislation have tried, with limited success, to define the balance between the two conflicting provisions of the first amendment.

In late 1981, The U.S. Supreme Court upheld the right of university students to use public facilities for religious practice if the same facilities were provided to other university groups.69 Six days later, it refused to grant certiorari to an appeal of a Second Circuit decision which upheld a public school's refusal to allow a student religious group to meet on campus.70 The Third, Fifth, and Eleventh Circuits have since recorded decisions consistant with the Second Circuit,71 but the Northern District Court for Illinois supports such access.72

A final loop in the knot, The Equal Access Act,73 effective in August 1984, makes it unlawful for public secondary schools to deny access to their facilities to student religious groups if the school allows other groups to meet on campus. In each of the four Circuit Court decisions, the gravamina concerned the impermissable entanglement of church and state; additional litigation shall prove if contrary federal legislation will

assuage the courts' fear that student worship on campus violates constitutional safeguards.

In the widely-discussed Widmar v. Vincent,74 the Supreme Court believed that denying a religious group the opportunity to use an open public forum established by a university constitutes regulation of religious content speech.75 Absent a compelling state interest, the university was thus in violation of the students' free speech and free exercise rights. The court held that allowing students the opportunity to meet and discuss religious ideas would benefit religion only incidentally.76 While noting that the university has a compelling interest to separate church from state, the Court maintained, "it does not follow, however, that an ¢equal access' policy would be incompatible with this Court's Establishment Clause cases."77

It is important to note the final paragraph of the majority opinion:

> The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.78

Given this record, one may only speculate as to why the Court allowed to stand the Brandon v. Board of Educ. of Guilderland School Dist. decision.79 Here, the group "Students for Voluntary Prayer," was denied permission to meet in an unused classroom before the start of each school day, although other student groups were able to meet in such fashion. The

Second Circuit opined that religion would be unconstitutionally advanced if the group were allowed to meet.

Perhaps the best argument to distiguish between the cases is that public school students are more impressionable than are young adults in college:

> Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values ot our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.80

A Fifth Circuit decision takes the argument a step further. In Guilderland, the Eighth Circuit upheld the right of the school district not to allow student religious groups to meet; in Lubbock Civil Liberties Union v. Lubbuck Independent School District,81 the Fifth Circuit forbids school districts from allowing such groups to meet.

At primary issue in Lubbock was a school board rule which "permits students to gather at the school with supervision either before or after regular hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious, or ethical purposes so long as attendance at such meetings is voluntary."82 The Court found this rule to have as its primary purpose the allowing of religious group meetings, to have a primary effect of advancing religion, and to entangle impermissably the state in supervising religious activity.83

Lubbuck cannot be considered a straightforward ban on religious access to school facilities, however. The Court was influenced by the long

history of the school district in promoting religion through morning Bible readings over the school public address systems, classroom prayers led by teachers, a period of silent prayer ended by "amen" over the public address systems, and distribution of Gideon Bibles to elementary students. Such practices continued at least until 1979, and the court believed that the offending school policy struck in the decision was intended to maintain under another guise the traditional religious practices.84 Legislation passed without the same historical baggage may have been considered differently.

Slightly different circumstances guided the Third Circuit in its 1984 decision, Bender v. Williamsport Area School District.85 The school district had established an activity period during regular school hours to promote intellectual, physical or social development of students. The only student-organized group denied permission to meet during this period was a non-denominational prayer fellowship called Petros. Noting that public high school students do not possess the same intellectual maturity as college students and the limited nature of public schools as open forums, the Court held that, although the students had protected free speech rights, the obligation of the school district to avoid the establishment of religion overrode the students' interest.86

The Court concluded that allowing the students to meet as a religious organization did have a valid secular purpose,87 but permitting Petros to meet would unconstitutionally advance religion and require undue entanglement in the supervision of the activity.88 Of primary concern to the Court was the role teachers would be forced to play in supervising the activity. The Court, however, clearly limited its decision to the particular circumstances present at Williamsport Area High School.89

The Eleventh Circuit was presented a similar case in 1984 when a Georgia school system allowed a Youth for Christ Club to meet on school premises under faculty supervision and announced church sponsored activities over the schools' public address systems and bulletin boards.90 The District Court had granted a preliminary injunction in favor of the plaintiffs, and the school system appealed.

The Eleventh Circuit concluded that a policy of announcing church-sponsored activities may be violative of the entanglement prong of the establishment test. The Court also upheld the District Court's injunction against the use of school facilities for religious meetings by students, but it encouraged the district court to consider such factors as the extent of faculty sponsorship, the school's policy in relation to other groups desiring space for meetings, and the impression left on the students of allowing religious groups to meet.91

While the four Circuit Courts appear in relative agreement over religious access to public schools, the U.S. District Court for northern Illinois came to different conclusions.92 Antiwar activists, including some associated with religious organizations, sought to have access to students equal to that of military recruiters. In part, the Chicago city schools prohibited equal access for the antiwar activists in fear that such access would constitute an establishment of religion. The Court held that "a policy of allowing religious groups access to a public forum equal to that allowed secular groups would not violate the establishment clause . . . (T)he First Amendment demands neutrality of treatment between religious and non-religious groups."93 Additionally, the Court considered the allowing of military recruiters on campus to create an open forum which could not be regulated on the bases of speech content.94

In the summer of 1984, Congress entered the fray. Passing both Houses with overwhelming majorities, the Equal Access Act forces public secondary schools which receive federal financial assistance and which provide limited open forums for non-curriculum related groups to allow voluntary student-initiated groups equal access to the schools' facilities. The meetings must not interfere with the normal conduct of the school, and they may not be sponsored by the school or an outside group, although teachers may be present as nonparticipants. An earlier provision which would allow the Department of Education to withhold federal funds for noncompliance was not included in the adopted Act.95 The Act, and guidelines read into the Congressional Record, are attached as an Appendix.

Will the Act pass constitutional muster in light of the four Circuit Court opinions disallowing religious meetings on campus? As mentioned, each of the cases presented special circumstances not present in the Congressional legislation. If the Act founders, it will be on entanglement problems. The Supreme Court and the various circuit courts have recognized that high school students must be shielded from any impression of state imprimatur on a particular religion. How school officials can supervise relgious activities as nonparticipants and at the same time remain strictly neutral may be a juggling act beyond their powers.

REGULATION OF PAROCHIAL SCHOOLS

In 1925, the U.S. Supreme Court established the right of private schools to operate,96 and no recent litigation has challenged that right. However, as the attraction of private sectarian education grows, particularly for fundamentalist Christians, new litigation seeks to define the right of the state to regulate private schools.

In late December 1983, the U.S. District Court for Maine granted private schools the right to operate without state regulation.97 Maine had required a modest program for approval of private schools. An association of private sectarian schools objected to the state's program as an unwarranted intrusion into the lives of private individuals and institutions. The state sought to enforce its approval program by charging the parents of students in unapproved schools with truancy violations. It also threatened prosecution against church leaders who preached that education is a religious duty on the grounds that they were inducing habitual truancy.

The District Court found that Maine provided no statutory authority for prosecuting as truants students who attended unapproved schools. The court decided that religious worship and discussion were integral aspects of the private schools' curriculum which deserved full first amendment protection.98 Should the state decide to close a pervasively sectarian school, it would do so at great risk of violating the free exercise clause of the first amendment.99 With regard to promoting habitual truancy from the pulpit, the Court ruled such prosecution would raise fundamental constitutional concerns.100

A Michigan Court of Appeals ruled differently.101 A Michigan church-related school sought to excise state laws which mandated certain courses and curricular standards and for private school teachers to be certified by the state. The plaintiffs believed that "any attempt by the state to control or license their educational ¢ministry' is an infringment on their religious liberty."102

The state court found the objections of the private schools to be firmly based on religious doctrine, and if the state were to interfere with

religious practice, it must have an "overriding interst of the highest order."103 The court determined, however, that the compelling state interest in providing a proper education to all its children was sufficient to justify a reasonable program of regulation over private schools and did not entail an unnecessary entanglement between church and state.

The U.S. Supreme Court may side with the Michigan view that reasonable regulation of private schools is not constitutionally suspect. In late November 1984, it refused to review a Nebraska Supreme Court decision which found in contempt an unapproved private school which continued to operate despite court order.104 The state supreme court had ruled in 1981 in State v. Faith Baptist Church that the critical interest of the state in the education of its children allowed intrusion into the free exercise of religion.105 The U.S. Supreme Court would not hear an appeal from Faith for want of a substantial federal question.106

Certain limits do exist. In the continuing drama of Faith Baptist Church, the state trial court, after finding that the private school continued to operate in violation of the injunction against it, ordered the sheriff to padlock the church and school building except at times when the building was used for church services. In enforcing the order, the sheriff and fifteen carloads of deputies carried from the church about eighty-five persons who were conducting a protest prayer vigil. The protesters filed suit in federal district court claiming damages against the state and its officials for violating their right to the free exercise of religion. The District Court ruled for the defendants, but the Eighth Circuit reversed.107 It left intact the state's right to regulate private schools but believed the sheriff went too far in removing the church members from the building: "We assume that the state's interest in preventing the

operation of the unapproved church school is a compelling one. That interest does not in any even justify hauling worshippers out of an ongoing church service."108

Another form of regulation is zoning. Two recent cases have upheld the right of local government to prohibit private schools from operating in violation of zoning ordinances.

The Arkansas Supreme Court found that the operation of a private church school was a religious action rather than a religous belief.109 Infringement upon religious beliefs are absolutely prohibited, the court found, but the state has the right to protect the public welfare with reasonable laws governing religious action.110 Because the church school had not applied for a conditional use permit, it was enjoined from operating. The court further noted that a permit to operate a church does not automatically authorize the church to open its own school.111

A similar case in Virginia was appealed to the U.S. Supreme Court after the two lower federal courts found in favor of the city's right to govern property use. The Supreme Court refused to hear the case.112

Still another form of regulation relates to labor disputes, and two recent decisions conflict. A U.S. District Court in New York found that if the state labor relations board entered a dispute between lay teachers and parochial schools, it risked entangling government with religion,113 while a U.S. District Court in Virginia found that minimum wage enforcement against a parochial school does not violate the first amendment.114

In Catholic High School Association of New York v. Culvert, the Lay Faculty Association filed unfair labor practice complaints against a parochial school association. The Court believed that allowing the State Labor Relations Board jurisdicition in the case would threaten the

inclusion of religious subjects in the collective bargaining process. The result would require a state agency to moderate religious disagreements, and the Court could not abide such an arrangement.

In Donovan v. Shenandoah Baptist Church, the church school claimed that it was governed by the Word of God and that submitting its internal affairs to regulation by government would violate its religious principles. At primary issue was the entanglement of church-state affairs if government were allowed to regulate the parochial school's salary structure. The Court found that no significant disruptions of the parochial school's religious or educational activities would result from enforcement of the Minimum Wage Act, nor would it infringe upon free exercise rights when the minimum wage itself is not repugnant to the school's religious tenets.116

Some parents, for religious reasons, choose not to send their children to any form of school and cite as precedent Wisconsin v. Yoder.117 In Yoder, the U.S. Supreme Court found that the Amish, a group with distinct religious beliefs and practices buttressed by 300 years of tradition, were entitled to exception from the state's compulsory education laws.

In North Carolina, a father held his two school age children out of school because of religious and "sociopsychological" objections to public schools.118 The appellate court held that the "State of North Carolina has a compelling interest in providing access to education for all . . . The State has no means by which to insure that children who are at home are receiving an education. Therefore, the State's interest in compulsory education outweighs plaintiff's interest in educating his children at home because of religious and sociopsychological beliefs."119

Similar logic controlled an Arkansas Supreme Court decision.120 In not sending his child to any school, the father alleged, inter alia, that

compulsory education violated his free exercise of religion. In distinguishing the case from Yoder, the court found the father unable to show that sending his child to some form of school would interfere with religious or cultural traditons comparable to those of the Amish.121 In a concurring opinion, Justice Purtle notes that "No member of this court is of the opinion that a parent does not have the right to give his child a religious education at home."122 However, this right did not extend to keeping the child out of any kind of school whatsoever.

Home instruction and private parochial schools which balk at any governmental regulation are proliferating, and many state officials are concerned about the quality of education children are receiving in such settings. To date, only the U.S. District Court of Maine has limited the state's right to reasonable control over nonpublic education. Overwhelming judicial tradition recognizes the compelling state interest in ensuring a high-quality education for all of its children, but equally impressive precedent holds that children and their parents do not surrender their constitutional rights in educational environments. Undoubtedly litigation concerning the state's right to control certain aspects of nonpublic education will continue, fueling the search for the nebulous line separating state interests from the free exercise rights of the individual.

## Conclusion

A definitive line marking the proper distance between church and state has eluded jurists for two hundred years, and recent litigation has done little to sharpen the focus. The U.S. Supreme Court, in two recent decisions,123 has tended toward a more accomodating view of church-state involvement. Its decision in the forthcoming Jaffree, Ball, and Felton

cases will give a clearer indication if wall between church and school has been redesigned.

The U.S. Circuit Courts of Appeals present a united front in recent cases in separating church and school. Absent marked reversals in the pending Supreme Court cases, the Circuit Courts will likely preserve a high wall between secular and sectarian concerns.

The U.S. District Courts illustrate greater diversity, but in recent years on the whole, they, too, have kept tall the barriers between church and state. The individual state courts seem even more inclined to shield the schools from religious activity. Again, the current cases before the U.S. Supreme Court will influence future lower court decisions.

Despite the judicial proclivity to view with suscpicion any attempt to interject religion into schools, politicians have taken advantage of a religious awakening to promote legislation designed to lower the wall between church and state. In addition, five U.S. Supreme Court justices have reached the age of 75; Reagan appointees would likely take a more tolerant view of religion in public life.

In sum, our country will continue to struggle with the elemental tension between a religiously devout but diverse people and a secular government. Barring a celestial miracle, the truth is not likely to be found, even by those who now so earnestly debate the issues.

ENDNOTES

1See, for example, Cochran v. Louisiana State Board of Educ., 281 U.S. 370, 50 S.Ct. 335 (1930); Everson v. Board of Educ., 330 U.S. 1, 67 S.Ct. 504 (1947); Board of Educ. of Central School Dist. No. 1 v. Allen, 392 U.S. 236, 88 S.Ct. 1923 (1968); Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409 (1970); Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971); Sanders v. Johnson, 403 U.S. 955, 91 S.Ct. 2292 (1971), aff'g 319 F.Supp. 421 (D.Conn.1970); Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091 (1971); Levitt v. Cathedral Academy, 409 U.S. 977, 93 S.Ct. 316 (1973); Hunt v. McNair, 413 U.S. 734, 93 S.Ct. 2868 (1973); Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955 (1973); Sloan v. Lemon, 413 U.S. 825, 93 S.Ct. 2982 (1973); Levett v. Committee for Public Education and Religious Liberty, 413 U.S. 472, 93 S.Ct. 2814 (1973); Public Funds for Public Schools v. Marburger, 417 U.S. 961, 94 S.Ct. 3163 (1974), aff'g 358 F.Supp. 29 (D.N.J.1973); Wheeler v. Barrera, 417 U.S. 402, 94 S.Ct. 2274 (1974); Meek v. Pittenger, 421 U.S. 350, 95 S.Ct. 1753 (1975); Roemer v. Board of Public Works, 426 U.S. 736, 96 S.Ct. 2337 (1976); Wolman v. Walter, 433 U.S. 229, 97 S.Ct. 2593 (1977); Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 100 S.Ct. 840 (1980); Mueller v. Allen, ___U.S.___, 103 S.Ct. 3062 (1983).

2Felton v. Secretary, United States Department of Education, No. 84-238. Scheduled for oral argument December 5, 1984. Ruling below, 739 F.2d 48 (2nd Cir.1984); School District of City of Grand Rapids v. Ball, No. 83-990. Scheduled for oral argument December 5, 1984. Ruling below as Americans United for Separation of Church and State v. School District of City of Grand Rapids, 718 F.2d 1389 (6th Cir.1983).

3Everson, supra note 1.

4Board of Educ. of Central School Dist. No. 1, supra note 1 at 250, 88 S.Ct. at 1930.

5Id.; Cochran, supra note 1; Meek, supra note 1.

6Everson, supra note 1.

7Wolman, supra note 1.

8Tilton, supra note 1; Hunt, supra note 1; Roemer, supra note 1.

9Mueller, supra note 1.

10Lemon, supra note 1; Sanders, supra note 1.

11Levitt, supra note 1; Levett, supra note 1; Sanders, supra note 1; Committee for Public Education and Religious Liberty v. Regan, supra note 1; Public Funds for Public Education, supra note 1.

12Committee for Public Educ. and Religious Liberty v. Nyquist, supra note 1.

13Id., supra note 1; Sloan, supra note 1.

14Meek, supra note 1; Wolman, supra note 1.

15Wolman, supra note 1.

16Walz, supra note 1.

17Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942 (1968).

18Lemon, supra note 1 at 612-13, 91 S.Ct. at 2111.

19Felton, supra note 2.

20Title I of the Elementary and Secondary Act of 1965 (now Chapter One the Education Consolidation and Improvement Act of 1981) requires equal funding for private school students qualifying for remedial education. 20 U.S.C. s2740(a). Departmental regulations call for services for private school students to be comparable to that provided public school children. 45 C.F.R. s 116a.23.

21Felton, supra note 2 at 49.

22Id. at 54.

23Id. at 72.

24Id. at 55, quoting Meek, supra note 1 at 619, 91 S.Ct. at 2114.

25Id. at 64.

26Id. at 71-72.

27Id. at 72.

28School District of City of Grand Rapids, supra note 2.

29Id. at 1399.

30Id. at 1403.

31Id. at 1400.

32Id. at 1399.

33Id. at 1406. Emphasis added.

34Id. at 1412-13. Emphasis in original.

35Id. at 1408.

36Mueller v. Allen, supra note 1.

37McCarthy v. Hornbeck, 590 F.Supp. 936 (D.Md.1984).

38Id. at 945. See, also, d'Errico v. Lesmeister, 570 F.Supp. 158 (D.N.D.1983); Elbe v. Yanktown Independent School District No. 1, 714 F.2d 848 (8th Cir.1983).

39See Gail Paulus Sorenson, "Shall We Pray? The Latest Word from Legislatures and Courts," in Thomas N. Jones and Darel P. Semler, eds. School Law Update (Topeka, Kan.: National Organization on Legal Problems of Education, 1984), pp. 58-68.

40See, for example, Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261 (1962); and School District of Abington Township v. Schempp, 374 U.S. 203, 83 S.Ct. 1560 (1963).

41Ronald Reagan, The State of the Union Address, delivered before a joint session of the Congress (January 25, 1983).

42See Sorenson, supra note 39 at 58-62.

43No. 83-812.

44The blessings were 1) God is great, God is good, Let us thank him for our food, bow our heads we all are fed, Give us Lord our daily bread. Amen. 2) God is great, God is good Let us thank Him for our food. 3) For health and strength and daily food we praise Thy name, oh Lord.

45Id., 705 F.2d 1526 at 1529 (11th Cir.1983).

46Id.

47Jaffree v. Board of School Commissioners of Mobile County, 554 F.Supp. 1104 (S.D.Ala.1983).

48Id. at 1128.

49Jaffrre v. James, 544 F.Supp. 1130 (S.D.Ala.1983). Justice Powell issued a stay of the district court's order less than a month later. Id., ___U.S.___, 103 S.Ct. 842 (1983).

50Jaffree v. Wallace, supra note 45 at 1532.

51Id. at 1534.

52Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools. In the name of our Lord. Amen. Ala.Code s 16-1-20.2.

53Id. at 1534-35.

54Id. at 1535.

55Jaffree v. James, 544 F.Supp. 727 at 731 (S.D.Ala.1982); preliminary injuction.

56Jaffree v. Wallace, supra note 45 at 1535.

57Id. at 1535-36.

58Education Week, Sept. 26, 1984 at 1 col. 4, 5.

59See, for example, Karen B. v. Treen, 653 F.2d 897 (5th Cir.1981); Duffy v. Las Cruces Public Schools, 557 F.Supp. 1031 (D.N.M.1983); May v. Cooperman, 527 F.Supp. 1561 (D.N.J.1983); Beck v. McElrath, 548 F.Supp. 1161 (M.D.Tenn.1982).

60H.R. 11, 98th Congress, 2nd Session (1984).

61Lemon v. Kurtzman, supra note 1 at 624-25, 91 S.Ct. at 2115-16.

62supra note 59

63New Jersey P.L. 1982, Ch. 205 (1). Passed over Governor's veto.

64Cooperman v. Board of Education of the City of Woodbury, ___N.J.App.___ (1984).

65Crockett v. Sorenson, 568 F.Supp. 1422 (W.D.Va.1983).

66Id. at 1425.

67District Judge Kiser proceeded to outline a personel set of guidelines by which he believed Bible could be objectively taught. Id. at 1431.

68Schempp, supra note 40 at 231, 83 S.Ct. at 1576. (Brennan, J., concurring.)

69Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269 (1981).

70Brandon v. Board of Education of Guilderland School District, 635 F.2d 971 (2nd Cir.1980); U.S. cert. denied, 454 U.S. 1123, 102 S.Ct. 970 (1981).

71See, Bender v. Williamsport Area School District, 741 F.2d 538 (3rd Cir.1984); Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir.1982); Nartowicz v. Clayton County School District, 736 F.2d 646 (11th Cir.1984).

72Clergy and Laity Concerned v. Chicago Board of Education, 586 F.Supp. 1408 (N.D.Ill.1984).

73P.L. 98-377, Title VIII.

74supra note 69.

75Id. at 276, 102 S.Ct. at 278.

76Id. at 273, 102 S.Ct. at 276.

77Id. at 271, 102 S.Ct. at 275.

78Id. at 277, 102 S.Ct. at 278.

79supra note 70.

80Id. at 978 (citations omitted.) See, also, Widmar, supra note 69 at 274, 102 S.Ct. at 276 n. 14.

81Lubbock, supra note 71.

82Id. at 1041.

83Id. at 1048.

84Id. at 1045.

85supra note 71.

86Id. at 561.

87Id. at 551.

88Id. at 555, 557.

89Id. at 561.

90Nartowicz, supra note 71.

91Id. at 649.

92Clergy and Laity Concerned, supra note 72.

93Id. at 1412.

94Id. at 1411.

95H.R. 2732, 98th Cong., 1st Sess. (1983).

96Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571 (1925).

97Bangor Baptist Church v. State of Maine, Department of Educational and Cultural Services, 576 F.Supp. 1299 (D.Me.1983).

98Id. at 1326.

99Id. at 1327.

100Id. at 1334.

101Sheridan Road Baptist Church v. Department of Education, ___Mich.App.___, 348 N.W.2d 263 (1984).

102Id. at 268.

103Id. at 270. (citations omitted)

104North Platte Baptist Church v. Nebraska, No. 83-1974. Nebraska has since modified its rules governing private schools, and the subject school is now operating legally.

105State v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 571 (1981).

106Id. 454 U.S. 803, 102 S.Ct. 75 (1981).

107McCurry v. Tesch, 738 F.2d 271 (8th Cir.1984).

108Id. at 275.

109Abram v. City of Fayetteville, 281 Ark. 53, 662 S.W.2d 371 (1983).

110Id. at 372.

111Id.

112First Assembly Church of God v. City of Alexandria, Va., No. 84-445.

113Catholic High School Association of New York v. Culvert, 573 F.Supp. 1550 (S.D.N.Y.1983).

114Donovan v. Shenandoah Baptist Church, 573 F.Supp. 320 (W.D.Va.1983).

115supra note 113 at 1557.

116supra note 114 at 325, 326. In an interesting argument, the government claimed that if it did not force minimum wage guidelines to be respected by parochial schools, it would in effect be giving them an unfair economic advantage over other private schools and, thus, work unconstitionionally to establish religion. Id. at 325.

117Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526 (1972).

118Delconte v. State, ___N.C.App. ___, 308 S.E.2d 898 (1983).

119Id. at ___, 308 S.E.2d at 904.

120Burrow v. State, ___Ark.___, 669 S.W.2d 441 (1984).

121Id. at ___, 669 S.W.2d at 443-44.

122Id. at ___, 669 S.W.2d at 444 (Justice Purtle concurring.)

123Mueller, supra note 1, Lynch v. Donnelly, ___U.S.___, 104 U.S. 1355 (1984).